In the Supreme Court of the United States

OCTOBER TERM, 1917.

OLIVER B. SAALFIELD, ADMINISTRATOR of John Hamilton Brown, surviving claimant of John H. Brown and Harvey M. Munsell, trustees, appellant,
v.
THE UNITED STATES.
No. 101.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment dismissing the petition. Plaintiffs in the court below entered into a contract with the Government on the 18th day of May, 1898, for the construction of twenty-five 5-inch caliber guns and twenty-five 6-inch caliber guns. They sublet their contract to the Diamond Drill & Machine Company, of Birdsboro, Pa. The guns (Rec. 9, 10) were to be fired 300 rounds or less and were to have a muzzle velocity of 2,600 feet per second, except for the last five rounds, when there was to be a pressure of between 45,000 and

50,000 pounds per square inch. The guns and carriages were to (Rec. 10) "endure these tests in all respects satisfactorily, both as to strength of material and facility of operation," and to be (Rec. 11) "approved by the officers of the Ordnance Department before being accepted and paid for." The contract was to be completed August 8, 1898. The 5-inch gun was completed in the early part of 1899, and the test begun in March. The firing was suspended after the one hundred and thirty-third round until June 30, 1899, in order that plaintiffs might prepare a new proving ground, when the firing was renewed and the 300 shots completed August 9, 1899. Capt. MacNutt, inspecting officer, made his report to the Chief of Ordnance on August 29.

At every 50 rounds the gun was tested with a star gauge. At these gaugings and at different times throughout the test (Rec. 16) there was a varying and shifting both in increases and decreases in the diameters of the different cross sections of the bore, the gauging showing a reduction of the normal diameter of 5 inches down to 4.99 inches. An attempt was made to pass an iron plug of the diameter of the projectile through the boring at the one hundredth round. It stuck so tight as to require the efforts of three men to force it through with a pole. The cross section of the bore from time to time took on an elliptical form. On the two hundred and ninety-third round the breech bushing and jacket of the gun

were cracked and the breech could not be opened by hand. On November 3, 1899, the Chief of Ordnance submitted to the Secretary of War, Elihu Root (Finding IV, Rec. 17), the report of Capt. MacNutt. After thorough investigation it was approved by the Secretary. The letter stated in part that while the gun was not as satisfactory as was desirable, yet its test had apparently met the contract requirements, and upon condition that certain modifications in the gun and carriage be made, recommended that the gun and its mount be accepted subject to the condition that in view of the moderate pressure to which the gun had been subjected, the Department fire it 100 additional rounds or less, as might be deemed expedient, at the expense of the Government.

On January 22, 1900, Tracy, Boardman & Platt, attorneys for plaintiffs, asked for a hearing, but Secretary Root (Finding V, Rec. 18) wrote them that it did not appear that there was any question pending before the Department in relation to the contract. Plaintiffs asked for a hearing in February, 1900, stating that they had not as yet assented to any modification. On January 11, 1901, plaintiffs having failed to notice or accept the offer of the Government for a test of 100 additional rounds, and having failed to make the modifications or overcome the defects in the gun which had been ordered, Secretary Root approved the order and declared the contract "null and void," because plain-

tiffs had failed to "comply with the requirements of the Secretary of War and in further accordance with the provisions of the contract."

Notice of this action was given to plaintiffs on January 17, 1901. Plaintiffs protested and appealed to Secretary Root, but after a number of hearings held by him at which were present plaintiffs and their attorneys the Secretary "refused to revoke the annulment." (Finding VII, Rec. 20.)

Plaintiffs sued to recover damages in the sum of $140,502.95, the amount alleged to have been expended toward the performance of the contract before its annulment.

On February 19, 1913, pending the prosecution of the suit in the Court of Claims, Harvey M. Munsell died, and the cause proceeded in the name of John Hamilton Brown as survivor. Since the appeal was docketed in this court John Hamilton Brown died, and on October 16, 1916, his death was duly suggested to this court and his administrator, Oliver B. Shalfield, substituted as appellant.

Plaintiffs' position is that the gun met the test satisfactorily, and also met the requirements of the contract, and that in declaring the same rescinded, Secretary Root, the Chief of Ordnance, and other ordnance officers were not acting "in good faith, but under a mistake so gross as to justify an inference of bad faith." (Rec. 7.)

The Government maintains that Secretary Root, the Chief of Ordnance, and other ordnance officers not only extended every courtesy conceivable to

plaintiffs in order to help them meet the requirements of the contract, but that the tests failed in that they were not "satisfactory in all respects as to strength of material and facility of operation"; that the gun revealed weaknesses which indicated (Rec. 17) that it had reached "the limit of safety * * * and created a reasonable apprehension of danger in the minds of the Chief of Ordnance and other officials." * * * ; that as the contract gave the Chief of Ordnance, subject to appeal to the Secretary, the authority to interpret the word "satisfactorily" as applied to the gun and borings, and as plaintiffs had refused to make them satisfactory and go on with the work, the officials rightly annulled the contract. Having acted in good faith the decision of Secretary Root was final. Hence the Government could not be held for damages.

ARGUMENT.

FIRST.

THE DECISION OF THE CHIEF OF ORDNANCE THAT THE TEST HAD NOT PROVEN ENTIRELY SATISFACTORY WAS FINAL.

The contract says (Rec. 10) that "both gun and carriage must endure these tests in all respects *satisfactorily* both as to the strength of material and facility of operation," and (Rec. 11) "the work shall be * * * approved by the officers of the Ordnance Department before being accepted * * *." And again:

> If any doubts or disputes arise as to the meaning of anything in this or any of the

> papers hereunto attached and forming this contract, the matter shall be at once referred to the Chief of Ordnance, U. S. Army, for determination. If, however, the party of the first part shall feel aggrieved at any decision of the Chief of Ordnance, it shall have the right to submit the same to the Secretary of War, and his decision shall be final.

The opinion on page 25 states:

> * * * the parties seem to have interpreted it [the contract] as leaving that subject to the Chief of Ordnance, and that is doubtless the way in which it should be construed, subject, however, perhaps to the Secretary of War, which question will be noticed later.

It will be seen throughout the entire findings that plaintiffs understood that the Chief of Ordnance was the official who was to be satisfied with the test. The dispute with regard to whether the gun should be accepted after 300 rounds had been fired, regardless of dangers or weaknesses revealed, or should be tested until satisfactory to the Chief of Ordnance, brought into question the paragraph of the contract relating to doubts or disputes, and hence called for a reference to the Chief of Ordnance and appeal from him to the Secretary of War if desired. Appeal was taken from the decision of the Chief of Ordnance to the Secretary of War, who, after a number of hearings, sustained the Chief of Ordnance in declaring the contract forfeited. Plaintiffs in their petition charged these officials with not acting in good faith but in such a manner as to

"justify an inference of bad faith." The court, however, did not find that the officials of the War Department acted in bad faith. In its opinion (Rec. 26) it declared that the Chief of Ordnance had not acted in a "capricious" or unreasonable manner, and that he had "properly and rightfully required a test in addition to the one specified in the contract before approving the gun;" that the officers of the War Department (and this included Secretary Root) were not guilty of bad faith.

Therefore the decision of the Chief of Ordnance and the Secretary of War was final and the matter should have ended there.

SECOND.

THE CHIEF OF ORDNANCE AND SECRETARY OF WAR RIGHTFULLY DECLARED THE CONTRACT FORFEITED BECAUSE THE GUNS DID NOT SHOW A SATISFACTORY TEST.

Plaintiffs have charged Secretary Root, the Chief of Ordnance, and other officers of the War Department with bad faith despite the fact that all these officers were keenly desirous of having the gun pass the test, and did everything possible to help plaintiffs. For example, the contract was to be completed August 8, 1898, yet the time was extended by the Government, without any reason except to benefit plaintiffs, to March 15, 1899, a period of seven months. The Chief of Ordnance (Rec. 18) notified plaintiffs on February 6, 1900, that the test was not entirely satisfactory and that they would need 100 additional rounds or

less and waited from that time until January 17, 1901, a period of nearly a year, before declaring the contract annulled. Under the contract (Rec. 11) the Chief of Ordnance could have annulled it for failure to deliver the guns under the terms therein, and have deducted $5 per day from the "price to be paid therefor for each day of delay in such delivery," instead of extending the time and not making any such deduction.

Again, the Government officials had shown the most extreme leniency in not earlier revoking the contract in view of the numerous shortcomings in the gun carriage, the lack of strength of material and facility of operation. The findings state (Rec. 16) that on "one of these high pressure rounds, the 293d round, the breech bushing and jacket of the gun were cracked and the breech could not be opened by hand. These breaks were repaired, but the mechanism repaired did not operate satisfactorily thereafter." Long before the two hundred and ninety-third round the firing revealed weaknesses which were sufficient cause for annulling the contract. The report of Capt. MacNutt to the Chief of Ordnance, referred to in Finding IV (Rec. 17), recites, in part, as follows:

> * * * At the fiftieth round it was found that the lands in some parts of the bore were contracting and the grooves expanding. The change, not being uniform in the circumference, made the bore elliptical. At the one hundredth round the maximum

contraction at one place made the diameter 4.99 inches. This being the diameter of the shot's bourrelet, the bore was tested from time to time with a cylinder of that size. Subsequent star gauging showed that the bore kept changing continually during the whole firing, and at 140 to 150 inches from the muzzle the contractions of the lands between the two hundredth and two hundred and fiftieth rounds was more than sufficient to make up for the erosions. * * * The erosion appears to have extended up to 123 inches from the muzzle. * * * On the two hundred and ninety-third round, the first in which pressures between 45,000 and 50,000 pounds per square inch were obtained, the breech bushing and jacket were cracked, the crack running forward for several inches from the upper inner corner of the slot made in both for the extractor lever. The hinge pin was bent and the breech could not be opened by hand. The crack was probably due to the corners of the slot being made sharp instead of rounded. The manufacturers modified the breech bushing and extractor lever, making the former without a slot and the latter of gooseneck shape. The new form of extractor lever is not as effective as the old, on account of its bending under the strain when the cartridge cases are difficult to extract. * * * On account of erosions the charge was increased from the two hundred and fiftieth to two hundred and ninetieth rounds to 16 pounds 5 ounces, giving an average pressure of 32,000 pounds.

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On the two hundred and ninety-first round trials were commenced with a smokeless power made for a 6-pounder gun to obtain higher pressures. * * * It was this round which injured the breech mechanism.

At the conclusion of the test the following was noted in the condition of the carriage: The bores of the recoil cylinders and the pistons were scored by the scale which had dropped from the counter recoil springs. The piston rod was slightly scratched and coated with particles of brass removed from the sleeves by the edges of the perforations in the rod. The recoil cylinders leaked freely under slight pressure, and it was found that a plug which had been dovetailed in the steel had lifted from its seat, allowing the oil to pass freely. * * * The bronze bushing that was driven on the lower part of the top carriage or spindle was enlarged by the repeated shock of firing and remained in the pedestal. The rear half of the conical roller path on the top carriage shows considerable wear. * * * The test of the gun and its mount was closely limited by the stipulations of the contract. No test was required for accuracy, which would have been affected by the constantly changing bore. When the carriage gave way under 2,813 foot-seconds velocity, the reduction of the charge, as mentioned above, cut down the pressure to a very safe figure. * * * As the movements of the segments was the cause of the changes in the bore, these changes would probably have been much greater had the gun been

> tested under the pressures that are commonly obtained in built-up guns. I would consider that the test proves only that the gun and carriage together will stand 2,600 foot-seconds velocity and that for five rounds the pressures may reach 50,000 pounds per square inch; in other respects the test is inconclusive in not showing fully the effect of the looseness in the system of construction or the ballistic qualities of the gun and its ability to withstand repeated regular service pressures. * * * The compression on the segments or liner is unknown. It was supposed to be what it should be, but the results of the firing and observations on the winding of the 10-inch Brown gun evidence that it was very unequal.

All of the foregoing report, which is a public document, is the basis of Finding III (Rec. 17), which is summed up in the latter part thereof as follows:

> While the variations and reductions in the diameter of the bore of the type gun indicated by the star-gauging during the firing test did not quite reach a point of actual danger to the gun from rupture or explosion by sticking of the projectile in the bore in the process of firing they did reach the limit of safety in this respect, and created a reasonable apprehension of danger in the minds of the Chief of Ordnance and other officials of the War Department connected with the execution of the contract for the guns, and caused the Chief of Ordnance and the Secretary of War to refuse to pass and accept the type

gun unless it should satisfactorily pass a further test of 100 additional rounds, as proposed and recommended by the Chief of Ordnance in his indorsement of November 3, 1899, hereinafter set forth. This apprehension was heightened by the fact of the new and comparatively untried type of construction of the gun, and by its reversal of the usual behavior of guns of the ordinary types of construction in the way of its continued contractions and changes of bore in the course of extended use.

Counsel attempt to belittle the dangers revealed by the test, but the statement of Professor Denton of Stevens Institute (referred to at Rec. 20, Finding VI), an expert employed by plaintiffs as one of a commission to work at various mathematical problems connected with the construction of the 5-inch gun, shows in paragraph 4 of his conclusions, addressed to the Trustees of the Brown Segmental Tube Wire Gun that "the distribution of the wire windings secured a uniform compressive resistance in the firing tube throughout its length and without exceeding 90 per cent of the elastic strength of the tightest wiring, the lining tube was probably compressed so that with 50,000 lbs. per square inch of powder pressure it was not required to exert a tensile resistance." This meant that the stress was 90 per cent of the ultimate strength of the tube inside and the tension on the wire was 90 per cent of its elastic limit. Is it any wonder that with a pressure as great as 90 per cent of the strength of the wiring of this gun, and in view of the fact that

it was taking an elliptical shape with the inner tube shrinking in size instead of expanding, as in other tests, that the Government would call for 100 additional rounds and the court should find that the "limit of safety had been reached" and that the test had "created a reasonable apprehension of danger in the minds of the officials of the War Department"?

Counsel attempt to show that the test of 300 shots was very severe in comparison with the test for other guns, and that the life of a gun is not usually that of 300 shots.

A comparison between different guns of different sizes would throw no light on the situation, for the reason that the effect of the variations upon the gun depends upon circumstances known, such as the fact that large guns enlarge faster in the bore than small ones. The test here was not at all severe in that the contract called for a pressure of about 45,000 pounds and not to exceed 50,000 pounds per square inch for only five rounds. (Rec. 9.) None of the 300 rounds fired gave a pressure that great except the last five. It is a matter of general knowledge in the naval world that the service charge of powder used is 37,000 pounds pressure to the square inch, and the pressure here was under 37,000 pounds except the five high pressure rounds at the close.

Furthermore, the Denton report substantiates the position of the department in that it pointed out (Rec. 20) defects of construction and remedies sug-

gested in the way of modifications in the construction. Counsel for appellant assert that the Secretary of War had no right to annul the contract while the examination was being made by the Denton committee. An attempt was made to becloud the argument with the idea that the Denton report had something to do with the tests upon which the guns would be accepted or refused. As a matter of fact the Denton investigation had nothing to do with these tests. This committee simply gathered mathematical and scientific data which ought to have been gathered and submitted to the Government before the tests were made but which, while confirming in many instances by mathematical deduction the very defects brought out in the practical tests, had nothing whatsoever to do with the determination of the acceptability of the gun so far as the War Department was concerned.

Plaintiffs would have the court understand that they really believed that the gun had been accepted by the War Department, whereas in fact they knew that it had not. This is clearly indicated (Rec. 17, Finding IV) by their action in writing to the Chief of Ordnance and requesting him, after an informal talk between appellant Munsell and Maj. Smith of the Ordnance Department, to "write an official letter" passing the gun and carriage. Why have an official letter if they knew that the test had been acceptable? Their request of the Chief of Ordnance is a confession that they realized that the conversation

with Maj. Smith was in no sense binding or final. In view of the fact that in their brief counsel have made highly colored statements and assumptions in regard to the conversation between Munsell and Smith on this point and that Secretary Root and the Chief of Ordnance are charged with bad faith by appellant, the Government here refers to some of the testimony of Maj. Smith, who at the time of giving it had been made a brigadier general:

> Mr. Munsell was around the office there for several days about the time Capt. MacNutt's report was expected, and when it came in he came into the office one afternoon near closing time and asked as to the result. I had in mind Capt. MacNutt's statement wholly, that the gun would fire a projectile with 2,600 feet velocity and endure an excessive pressure test of five rounds, and I said, "It appears to have passed." He answered, "Yes, it does; and we can go on with the completion of the guns," and I said, "Yes." With that he bolted out of the office, and I suppose that that was the identical time when he commenced his fusillade of telegrams over the country. Within two or three days he was in the office again and I said, "We must make good those defects." He had no objection to that, but he wanted to see Mr. Brown. Mr. Brown came and I talked it over with him at length; we had several interviews during the two months from August 28 to November 3, in which we discussed the matter at length, and there was a growing

> conviction that something ought to be done to secure a little better gun than appeared on the surface. So we stated that technically it had made the firing requirements prescribed by the contract; but if you take all our statements there in the record, our qualified acceptance, it would appear that we thought something must be done, and Gen. Buffington's indorsement on Tracy, Boardman & Platt's letter to the effect that we were not entirely satisfied, but that we wished to be satisfied, and that we thought we saw a way of becoming satisfied in the mode of procedure we suggested. (Answer 22, p. 380, of Smith testimony.)

The crux of this case is the interpretation of the word "satisfactory." In applying the test of what was "satisfactory," the Chief of Ordnance had two things to consider, the efficiency and the safety of the gun. Plaintiffs focus their whole argument on the question of efficiency, because they are fearful of the question of safety. They emphasize the first paragraph from the report of the Chief of Ordnance, in which he says that (Rec. 18) "while the gun is not deemed as desirable for service, yet its test has apparently met the contract requirements." They avoid that part of the report which states that:

> * * * if certain modifications in the gun and its carriage shall be made in their further manufacture to remedy defects developed in the test, and in other respects be made to meet more fully the requirements of the de-

> partment, to which propositions the company willingly agree, it is recommended that the 5-inch-type gun and its mount be accepted, *subject, however, to the condition that, in view of the moderate pressure to which this gun has been subjected, the department fire it 100 additional rounds, or less, as it may deem expedient, with charges giving higher pressures and assimilating more nearly the pressures that would be experienced in actual service,* * * *. [Italics ours.]

How can any one, in view of this statement, say that the test was satisfactory to the department? The Chief of Ordnance had in fact said that the gun and carriages had not met the tests "in all respects satisfactorily both as to strength of material and facility of operation." Plaintiffs were satisfied so long as the velocity test of 2,600 feet per second of time at the muzzle was met. The question of safety did not seem to bother them. It did bother the Secretary of War and the Chief of Ordnance, who were handling an entirely new style of gun and were fearful for the safety of the men of the Navy. The Government, however, sought to the end to help plaintiffs out by saying that the cost of the additional test would be borne by the Government. Despite this, however, no test was ever made by plaintiffs, nor did they permit the Government to do so. What other conclusion can be reached than that they feared that the gun would explode in the additional test? Had the gun been of a safe and

serviceable type undoubtedly the Government would be using it to-day, but it is a fact easily ascertainable that this style of gun has never been adopted by the Government, although tested 19 years ago.

In view of all the circumstances of this case, Secretary Root could not have acted otherwise than in sustaining the decision of the Chief of Ordnance. If it were not that Secretary Root's character and judgment speak for themselves, it would be difficult to refrain from coming to his defense and that of the Chief of Ordnance on the charge of acting in bad faith.

The officer of the Government clothed with authority to pass upon this type of gun having acted in good faith, his decision can not be questioned.

Hudson on Building Contracts, pp. 580, 596–598.

Kihlberg v. *United States*, 97 U. S. 398.

Railroad Co. v. *March*, 114 U. S. 549, 553.

Railroad Co. v. *Price*, 138 U. S. 185–195.

United States v. *Gleason et al.*, 175 U. S. 588.

Barlow v. *United States*, 184 U. S. 123.

Jones v. *Simpson*, 116 U. S. 615, middle of page.

Ripley v. *United States*, 223 U. S. 702.

Cramp & Sons Ship & Engine Building Company v. *United States*, 239 U. S. 221.

Respectfully submitted.

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